



NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

EXHIBIT 4
DATE 3/16/2011
SB 153

Chair, Board of Directors
Bob Fellmeth, JD

NACC President / CEO
Maureen Farrell-Stevenson, JD

March 10, 2011

Re: OPPOSITION to Montana Senate Bill 153

Dear Senate Judiciary,

The National Association of Counsel for Children is a non-profit professional membership organization, of over 2,000 members, dedicated to enhancing the well being of children, youth, and families. Founded in 1977, the NACC works to promote quality representation of children and families in the legal system. A primary component of the NACC mission is to promote a child welfare system whereby each child is represented by a competent *attorney*.

Montana Senate Bill 153 was drafted to amend the statute governing a child's right to legal counsel in the Montana child welfare system. The current statute requires all children involved in a Dependency and Neglect case to be appointed an *attorney*. The proposed bill would amend the statute to read that if a guardian *ad litem* (a non-attorney, lay advocate, hereinafter referred to as "GAL") is available, an attorney need not be appointed.

For the reasons stated below, the NACC vehemently opposes the passage of Montana Senate Bill 153.

First, the NACC and the American Bar Association ("ABA") have explicit standards and recommendation that indicate an express preference for an attorney rather than a GAL.¹

Please note that we are not advocating against the appointment of a GAL. Rather, we are advocating that regardless of whether a GAL is appointed, an attorney should always be appointed.

GALS play a distinct, but complementary role from the attorney. GALs are the "eyes and ears" for the court – fact gatherers. The GAL can watch the child interact at the foster home, at the playground or at school. These are all valuable things that the court needs to hear from a GAL.

Although GALs and attorneys provide complementary roles, there are many unique functions of an attorney that GALs cannot fulfill. Unlike attorneys, GALs are not advocating for the stated interests of the youth. GALs are not there to inform the youth of their legal rights and advocate for those rights to be protected. Similarly, GALS do not spot legal issues the way an attorney is trained to do. Further, GALS do not maintain a confidential and privileged relationship with the youth, nor do they have the ability to represent the "significant legal concerns" of children facing the termination of parental rights.

Attorneys can use their professional training to spot legal issues and questions. Beyond issue-spotting, an attorney for a child (as an officer of the court and a member of the bar) can:

- ✓ File legal briefs and appeals;
- ✓ Present and cross-examine witnesses;

¹ Available at: <http://www.naccchildlaw.org/?page=PracticeStandards>;
http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf.

- ✓ Maintain an attorney-client relationship, allowing attorneys and children to share privileged and confidential communications on case issues, ensuring a distinct level of trust;
- ✓ Ensure that a child's expressed positions related to the litigation are effectively presented to the court, represent a child's legal interests and rights, and protect child clients by using their legal skills;
- ✓ Educate an abused and neglected child on their legal rights in the dependency proceeding;
- ✓ Advocate for and ensure the best educational placement for the child, thus increasing the chances of graduation;
- ✓ Ensure financial benefits upon aging out of care, thus increasing the chances that a permanent placement will be successful.

Additionally, an attorney for a child must follow a binding set of ethical rules, which can create a high standard of care when representing a child. Attorneys in dependency proceedings can also hold the State Department of Social Health Services accountable when it fails to meet the needs of the children in its care.

Two studies that demonstrate the effectiveness of attorneys in Dependency and Neglect proceedings are as follows:

- 1) *The Evaluation of the Legal Aid Society of Palm Beach County's Foster Children's Project* – shows that youth with attorneys have a significantly higher rate of permanency than youth without attorneys. Yet, these youth did not experience lower rates of reunification—thus, permanency was not at the expense of reunification, where appropriate.
- 2) The second study shows that youth with attorneys have decreased involvement in the juvenile justice system (advocacy on collateral matters, including educational issues, disability, etc.; coordination with public defender, etc.).

Dependency proceedings are arguably the most disruptive legal proceedings anyone can face, short of death penalty cases. The most basic rights of children will be decided by these proceedings:

- Who will be their mother, father, or siblings?
- Where will they live?
- Will they be hospitalized and what medications will they take?
- Where will they go to school?

No other legal proceeding that pertains to children has such a major effect on their lives. Our notion of basic civil rights demand that they have a trained legal advocate to speak on their behalf and to protect their legal rights, just as they would if they were facing a month in juvenile detention. The importance and trauma involved in these proceedings has recently been recognized by a federal court which held that foster kids have a constitutional right to adequate legal representation.²

Access to an attorney will provide youth with someone who can use the legal process to ensure their legal rights are being protected and ensure they are safe in a foster home or safe to return to their biological homes. An attorney can help prevent youth from running away and can help them or their parents access needed services.

² *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353 (2005).

To date, 35 of 51 states (including the District of Columbia) mandate legal representation for children. Of the 35, 17 mandate client directed legal representation, while 28 require child advocacy and law training for persons representing children in dependency proceedings. Additionally, 39 consider the child a party to all proceedings, and 30 guarantee a child's right to representation on appeal. In examining what a model state requires, we look to New York, which received an "A" on the First Star report. New York law requires that children *of every age* be appointed counsel in every abuse and neglect. An attorney in these proceedings must represent the child's wishes and interests, but the attorney may request—or the court may determine—that a conflict requires the additional appointment of a separate best-interests GAL. Furthermore, New York law provides guidance on training for children's counsel.

The NACC strongly believes that children involved in the child welfare system require trained, effective *attorneys* to represent them. Not only does the NACC believe that children need *attorneys*, but the NACC believes such attorneys should be specialists in the field of child welfare. As such, the American Bar Association accredited the NACC as the sole national organization authorized to certify attorneys as specialists in child welfare law. If passed, the bill will take Montana in the opposite direction of what has become a national best practice and trend.

Given the state of our economy, cutbacks are unavoidable. However, when state budget deficit problems threaten the curtailment of attorney representation for children, the cutback is misplaced, and the state will suffer exponentially in the long run. Cutbacks as severe as eliminating attorneys to represent children in Dependency and Neglect cases will have a devastating, long-term impact on the state of Montana and its children. Simply put, Senate Bill 153 is not in the best interests of Montana children.

Based on the foregoing reasons, the NACC urges you to oppose this Bill. Thank you in advance for your consideration. . Please do not hesitate to contact the NACC for additional information or to further discuss the issues raised.

Kind regards,

Maureen Farrell-Stevenson, JD
CEO / President